REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 117 OF 2018

BETWEEN

JULIUS MAUMBO DZOMBO.....APPELLANT

-VS-

REPUBLIC.....RESPONDENT

(Being an appeal against sentence passed by Hon. P. Wambugu SRM on 6.8.2018 in Mombasa CMC S.O Case no. 95 of 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act and an Alternative Charge of committing an indecent act with a child contrary to Section 2(1) as read together with Section 11 of the Sexual Offences Act.

2. The Appellant pleaded not guilty and the case proceeded to full hearing. He was convicted of the main count, and that the trial court sentenced him to serve forty (40) years imprisonment, after taking into account his mitigation and treating him as a first offender.

3. The Appellant being aggrieved by that decision lodged an Appeal to this Court against the sentence vide Amended Grounds of Appeal filed in Court on 21.9.2020, on the following grounds.

1. That the Learned trial Court magistrate erred in law and fact in convicting me the Appellant on a charge that is defective.

2. That the Learned trial Court magistrate erred in law and fact by placing reliance of evidence of falsehoods which was unreliable.

3. That the Learned trial Court magistrate erred in law and fact by ignoring the numerous inconsistencies in the prosecution evidence.

4. That the Learned trial Court magistrate imposed upon me a sentence that was double the one stipulated by the relevant law.

5. That the Learned trial Court magistrate erred in law and fact when he failed to see that the whole case was a fabrication.

SUBMISSION

4. The Appellant filed his written submissions and relied on the same. On the defective charge, the Appellant submitted that according to the charge sheet the defilement occurred on 26.7.2016 while the sexual assault occurred on 12.7.2016 when both offences are supposed to have happened in a single transaction. Further, there were inconsistencies over the exact date of the alleged incident. The complainant alleged that the incident happened in 20.4.2016. However, on cross-examination, she stated that the incident took place on 20.7.2016. The same inconsistencies also applied to the date of the examination of the complainant. Consequently, the inconsistencies render the charges to be fatally defective and a violation of his rights guaranteed under Article 50(2) (b) of the Constitution.

5. The Appellant further submitted that there were inconsistencies in the age of the complainant since she told the trial Court she was 15 years old at the time of the incident, yet PW2 in his testimony stated that the complainant was 16 years old. Therefore, the inconsistency renders his conviction unsafe. The Appellant also submitted that crucial witnesses were left out by the prosecution.

6. On the sentence, the Appellant submitted that the trial Court was responding to its emotions when it imposed a sentence which was double what was prescribed by relevant law and as a result the trial Court deviated from the prescribed penalties and prescribed a harsh sentence of 40 years imprisonment which is equivalent to life imprisonment and the trial Court also ignored his alibi.

7. **Ms. Mwangeka** Learned Counsel for the D.P.P submitted that the grounds relied on by the Appellant in submitting that the charge is defective cannot hold since the Appellant all through understood the nature of the offence facing him. Further, the trial Court noted the contradictions however, the same were very minor to prejudice the Appellant.

8. On the age of the complainant, **Ms. Mwangeka** submitted that a clinic card produced in Court was sufficient proof that the complainant was born on 4.10.2001 and that all the medical evidence corroborate the fact that there was penetrative sex and as a result of the penetration, the complainant conceived and the Appellant was confirmed to be the father of the child. Further, on the alleged alibi and a grudge between the complainant's pastor and the Appellant, the trial Court considered the same and established that the same was an afterthought and choreographed at best.

9. On sentencing, under Section 8(3) of the Sexual Offences Act, Counsel submitted that once convicted, one is rendered to serve a minimum sentence of 20 years imprisonment. Therefore, the 40 years sentence was within the law.

DETERMINATION

10. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Kiilu & Another V. Republic [2005] 1 KLR 174** where the Court of Appeal held that:

> **"An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1st Appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, only then can it decide whether the Magistrate's finding should be supported. In doing so it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses. ….**

11. The Appellant seeks to challenge his conviction and sentence for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act.** The Section reads;

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**

Defectiveness of the charge sheet

12. I have perused the record and have seen that the charge sheet indicates that the date of the offence was on 20.7.2016 while the facts of the case as stated by PW1 refer to 20/4/2016 as the date of the offence. The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of ***JMA v. Republic*** **(2009) KLR 671,** it was held inter alia that:

> **"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."**

13. Applying this principle to the rival arguments of the parties, I am satisfied in the instant case that this was a discrepancy which did not prejudice the Appellant and that no miscarriage of justice has been occasioned as a result of the difference in dates. The errors on the dates cannot make the charge sheet defective or the conviction a nullity. This defect is therefore curable under **Section 214(2)** of CPC which provides that:

> **"…variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."**

14. Ingredients for the offence of defilement are proof of age, penetration and whether the appellant was identified as the person who defiled the victim. I will look at each of the ingredient of the offence alongside evidence adduced.

Age of the complainant

15. In the case of **Hadson Ali Mwachongo Vs. Republic [2016] eKLR, the Mombasa** Court held that:

> **"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim…"**

16. It is noteworthy that PW2 Rai Chaka who is the complainant's father produced an immunization card, which indicated that the complainant was born on 4.10.2001. Therefore, I find that at the time of the alleged defilement which was 20.7 2016, the complaint was 15 years old. The Appellant did not adduce any evidence to challenge the contents of the immunization card produced by PW2. Additionally, the answer by PW2 during cross-examination that his daughter was 16 years old is true since the trial Court heard the matter on the 1.8.2017 when the complainant was 16 years old. Consequently, the Appellant's Appeal fails on this ground.

Penetration and identification of the Appellant.

17. It is an undisputed fact that there was penetration of the complainant's vagina and as a result of the penetration, the complainant became pregnant and a Human Identification Report dated 4.9.2017 produced by PW5 confirmed that indeed the Appellant was the biological father of the complainant's child. On identification, PW1 stated that he knew the Appellant since he was her neighbor and they used to attend the same church.

18. From the foregoing, I find that the three ingredients for the offence of defilement were proved beyond reasonable doubt. I will not therefore interfere with conviction by the trial court. Appeal on conviction is therefore dismissed.

19. As to whether the appellant sentence was harsh and unreasonable, I note that the appellant was charged for **Defilement** contrary to **Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006**, which provides as follows:

> **Section 8. (1) of the Sexual Offences Act No. 3 of 2006** states;
>
> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

While **Section 8. (3) of the Sexual Offences Act No. 3 of 2006** states:

> **"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."**

20. Having been convicted for the offence of defilement, the trial Court considered the Appellant's mitigation that he had a disabled parent, a wife who was pregnant, and that he was the sole breadwinner of his family. The trial Court after considering the Appellant's mitigation noted that Section 8(3) of the Act provided for a sentence for a term not less than 20 years. The trial Court went ahead to note that the Appellant preyed on the young despite being married and it is for that reason that the trial Court deemed it fit to mete out a deterrent sentence in exercise of its discretion.

21. Sentencing is a discretion of the trial court. In **Bernard Kimani Gacheru –Vs- Republic (2002) eKLR**, the Court of Appeal stated that:-

> **"It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.**

22. This court bears in mind that one of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done and that there is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. (See **Charles Ndirangu Kibue v Republic [2016] eKLR).**Further, the court ought to bear in mind the obligation imposed on it by the Judiciary Sentencing Policy Guidelines to take into account the aggravating and mitigating circumstances and their effects on the sentence in determining the most suitable sentence.

23. In consideration of the decision of Supreme Court in the Muruwatetu's case and inconsideration of the minimum sentence set by the Sexual Offence Act and inconsideration of the appellant's mitigation before the trial court, the sentence of 40 years is excessive and is set aside and substituted with one of 20 years imprisonment.

Right of appeal in 14 days.

Dated, signed and **delivered** at **Mombasa** this **30th** day of **December, 2020**

HON. LADY JUSTICE A. ONG’INJO

JUDGE